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No. 90-1186

In The

Supreme Court of the United States

October Term, 1990

JOHNSON GAS APPLIANCE COMPANY,

Petitioner,

vs.

VE HOLDING CORPORATION,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

In amending 28 U.S.C. § 1391(c), which now uniformly defines the residence of a corporation "For purposes of venue under this chapter," did Congress instead intend this language to *mean* "For purposes of venue under this chapter, *except for Section 1400(b)*"?

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BRIEF IN OPPOSITION

QUESTION PRESENTED

In amending 28 U.S.C. §1391(c), which now uniformly defines the residence of a corporation "For purposes of venue under this chapter," did Congress instead intend this language to *mean* "For purposes of venue under this chapter, *except for Section 1400(b)*"?

STATEMENT OF THE CASE[1]

This is a simple statutory interpretation case. In 1988, Congress completely rewrote the corporate venue

[1] The items required by Supreme Court Rule 24.1(b),(d),(e) & (f) are not included herein as Respondent is satisfied with their presentation in the Petition (Sup.Ct.R. 24.2).

provision, Title 28 U.S.C., Chapter 87, Section 1391(c) (hereinafter "New 1391(c)"). In this patent infringement action, the question presented to the court of appeals was whether Congress meant what it specifically said in New 1391(c), *i.e.* that "For purposes of venue *under this chapter*," a corporation resides wherever it is subject to personal jurisdiction.

Using this Court's rules of statutory interpretation, the court of appeals held that the meaning of New 1391(c) was plain, and that the term "reside," was now specifically defined by Congress for *all* sections of the Venue Chapter, including the patent venue section of Chapter 87, Section 1400(b). Therefore, because the Petitioner was subject to the personal jurisdiction of the district court, the court of appeals reversed the district court, which had dismissed the case for improper venue.

The court of appeals also held, and properly so, that *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), its predecessors and progeny, *need* not be "distinguished" from the case at bar.[2] Instead, *Fourco Glass* was simply no longer an issue in cases against corporate defendants under New 1391(c). (Appendix to the Petition ("Appx.") at A-9, 917 F.2d at 1579) The court of appeals reached that conclusion because this Court's decision in *Fourco Glass* was based upon a statutory scheme which no longer exists. Furthermore, pre-1988 amendment 1391(c) (hereinafter "Old 1391(c)"), which was at issue in *Fourco Glass*, did not contain New 1391(c)'s classic and unmistakable Congressional language of incorporation – "For purposes of venue *under this chapter*." Therefore, writing on a clean slate, the court of appeals held, after searching the legislative history in vain for any contrary indications, that New 1391(c) meant exactly what Congress said. The court of appeals was correct, and this Court should deny the Writ.

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[2] The court of appeals opinion is now reported as *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

ARGUMENT

In what the Chief Justice has characterized as "the most significant legislation affecting the Federal courts since the early part of the decade," (Appx. at A-30), Congress enacted the Judicial Improvements and Access to Justice Act of 1988. As part of that act, Congress completely rewrote the corporate venue provision, 28 U.S.C. Section 1391(c). New 1391(c) bears little, if any, resemblance to Old 1391(c).

No party or court in this matter has ever debated the "plain meaning" of New 1391(c); the statute is crystal clear. New 1391(c) begins by expressly stating that the definition of "reside" set forth therein must be used "for purposes of venue under this chapter." This "chapter" is, of course, Chapter 87 of Title 28, which contains Sections 1391 through 1412. The plain meaning of New 1391(c) is that a corporation now will be deemed to "reside" in any judicial district in which it is subject to personal jurisdiction. The patent venue statute, Section 1400(b), in turn plainly states that a defendant can be sued where it "resides."

This Court has been equally plain about interpreting acts of Congress:

> We begin with the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself. *Absent a clearly expressed intention to the contrary,* that language must ordinarily be regarded as *conclusive.*

Consumer Product Safety Commission v. GTE Sylvania, Inc., 447 U.S. 102, 108 (1980).

> Unless *exceptional circumstances* dictate otherwise, "when we find the terms of a statute unambiguous, judicial inquiry is complete."

Burlington Northern Railroad Co. v. Oklahoma Tax Comm'n, 481 U.S. 454, 461 (1987).

> While we now turn to the legislative history as an additional tool of analysis, we do so with the recognition that only the most *extraordinary*

> *showing of contrary intentions* from those data would justify a limitation on the "plain meaning" of the statutory language.

Garcia v. United States, 469 U.S. 70, 75 (1984).[3]

After having correctly determined that the plain meaning of New 1391(c) required applying of its definition of "reside" to Section 1400(b), the court of appeals examined the legislative history in search of a clear showing of intent contrary to that plain meaning. However, the legislative history contained *nothing* about the first sentence of New 1391(c), the portion of the statute at issue here, other than to state that the origin of New 1391(c) as a whole was the Judicial Conference of the United States.[4]

Finding no indications, clear or otherwise, that Congress did not mean what it said about the new definition of "reside," the court of appeals correctly held that the plain meaning controlled. In addition, the court of appeals examined the material generated by the Judicial Conference of the United States, the drafters of New

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[3] *See also United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. 2657, 2662-4 (1989); *Immigration & Naturalization Service v. Cardoza Fonseca*, 480 U.S. 421, 341 & n.12 (1987); *United States v. James*, 478 U.S. 597, 606 (1986); *United States v. Albertini*, 472 U.S. 675, 680 (1984); *Russello v. United States*, 464 U.S. 16, 20 (1983); *Dickerson v. New Banner Institute*, 460 U.S. 103, 110 (1983); *United States v. Turkette*, 452 U.S. 576, 580 (1981). All emphases are supplied by counsel.

[4] The Petitioner, by focusing solely on portions of the legislative history which discuss the *second* sentence of New 1391(c) (concerning limiting the districts within a multi-district state where venue would be proper over a corporation that is subject to personal jurisdiction in the state as a whole), fallaciously concludes that Congress meant to "narrow" venue by enacting New 1391(c). While it is clear that the *second* sentence of New 1391(c) proscribes certain venues which would otherwise *now* be proper under the *first* sentence of New 1391(c), it is equally clear that by equating "reside" with "minimum contacts," the first sentence of New 1391(c) greatly *enlarges* the formerly more limited venue choices under Old 1391(c).

1391(c). This material confirmed the plain meaning by conclusively showing that the drafters of New 1391(c) meant exactly what they said. (Appx. at A-14, 917 F.2d at 1582; *see also* A. Rich, G. Methvin & T. Crisman, *The Judicial Improvements and Access to Justice Act: New Patent Venue, Mandatory Arbitration and More*, 5 HIGH TECH. L. J. 311, 316-20 (1990)). Because Petitioner is subject to the personal jurisdiction of the district court, it also "resides" there; therefore venue in the district court was proper.

Contrary to this Court's clear rules on statutory interpretation, Petitioner maintains that the plain meaning of New 1391(c) should be ignored. Petitioner therefore faults the court of appeals for not attributing the following radically different meaning to New 1391(c): "For the purposes of venue under this chapter, *except for Section 1400(b)*, a corporation resides wherever it is subject to personal jurisdiction." Petitioner then attempts to justify ignoring the statute's plain meaning, and engrafting a judicial exception to New 1391(c), by citing *Fourco Glass*. The court of appeals correctly held, however, that *Fourco Glass* is not applicable now that Congress has completely rewritten the statutory scheme under which *Fourco Glass* was decided. As one court eloquently stated:

> "heredity" is not a determinative factor in statutory interpretation, particularly when there has been a change of language. Here there has been an entire rephrasing and restructuring of the statutory provision, a circumstance which always warrants a fresh determination of meaning free of the influence of old decisions, interpretations and administrative practices. In any event, the use of a significant new term is more than enough reason to justify a full examination of the new language in its own right.

Volkswagen of America, Inc. v. United States, 340 F. Supp. 983, 989 (Cust. Ct. 1972), *aff'd per curiam*, 494 F.2d 703 (CCPA 1974). This Court has also held that Congress need not explicitly state that it was changing pre-amendment statutory interpretation in order for the text of the amended statute to be applied as written. *Community for*

Creative Non-Violence v. Reid, ___ U.S. ___, ___, 109 S.Ct. 2166, 2177 (1989). Furthermore, this Court has specifically held that when the meaning of a statute is clear, it is impermissible for a court to create an exception to it, especially where, as here, the legislative history is silent on the subject of the proposed exception. *See United States v. Monsanto*, ___ U.S. ___, ___, 109 S.Ct. at 2657, 2662-63 (1989).

Petitioner has also criticized the court of appeals' interpretation of this Court's opinion in *Brunette Machine Works v. Kockum Industries*, 406 U.S. 428 (1972). Petitioner maintains that the court of appeals held that the *Brunette* opinion "modified" *Fourco Glass* so that *Fourco Glass* could then be "distinguished" from the case at bar. For the reasons set out above, *Fourco Glass* need not be "distinguished." Nevertheless, Respondent would point out that the court of appeals did *not* "use" *Brunette* to distinguish *Fourco Glass*. Rather, the court of appeals found that *Brunette*, wherein this Court held that Section 1391(d) controlled a venue question in a patent infringement case, made it clear that this Court has never created a perpetual *structural* barrier to Congress placing provisions in Section 1391 which are calculated to influence or control venue in patent infringement cases. (Appx. at A-8, 917 F.2d at 1579). This interpretation of *Brunette* is correct and consistent with application of the "plain meaning" rule.

Petitioner's arguments for granting certiorari evaporate without *Fourco Glass* and in light of the plain meaning rule. Petitioner is then forced to rely instead upon strained theories of statutory interpretation. The Petitioner cites *Redzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) for the proposition that the specific statute should prevail over the general one. This rule has no application here, where one statute specifically and unequivocally states that it is defining a term for use in the other. To apply the *Redzanower* rule here would be to *ignore* the plain language, not *"interpret"* it. Such an approach to statutory construction – which elevates judicial rules of

construction over the very words of Congress – is dangerous, and may raise other questions of constitutional magnitude. *United States v. Albertini*, 472 U.S. 675, 680 (1984).

Petitioner also argues that certiorari should be granted because the court of appeals' application of the plain meaning of the statute would result in bad venue "policy." (Petition at 7). The short answer to this argument is that the "policy" now in force under New 1391(c) is not that of the Federal Circuit, but of Congress, and the plain meaning of a statute cannot be ignored because a court believes it to be bad "policy." *See United States v. Albertini*, 472 U.S. 675, 680 (1984). Furthermore, to the extent that Petitioner is really arguing that the result of applying the statute's plain meaning here is so bizarre that it could not really represent the intent of Congress, there is no "policy" support for that position. In fact, the court of appeals thoroughly analyzed this "policy" question (Appx. at A-14-17, 917 F.2d at 1582-84), and found, *inter alia*, that there is nothing "absurd" about the decision of Congress to "bring the law of venue in patent cases more in line with venue law generally, as well as with other types of patent litigation." (Appx. at A-17, 917 F.2d at 1583-84).

Finally, Petitioner argues that to apply New 1391(c)'s plain meaning cannot have been the intent of Congress because to do so renders a portion (but not all) of Section 1400(b) superfluous. This is simply untrue, in light of the fact that a patent infringer can be an individual, joint venture, unincorporated association, or any other non-corporate entity. No portion of Section 1400(b) has been rendered "essentially meaningless."

The rule of law which the Petitioner would have this Court adopt in order to return patent venue to its "dark ages" is unsound and overturns constitutional notions of the separation of powers. Examined carefully, the Petitioner seeks to create the following rule of statutory construction: Once a statute has been interpreted in a certain way by this Court, Congress cannot amend that

statute to give it a *plain meaning* at odds with this Court's prior interpretation – unless Congress also explicitly (and redundantly) states in the legislative history that Congress does indeed mean exactly what is plainly stated in the text of the new amended statute. Of course, such a rule would be unprecedented, unsound and unconstitutional. Significantly, such a rule is also the *only* way of interpreting New 1391(c) consistently with the strained construction urged by Petitioner.

CONCLUSION

The court of appeals was correct in applying New 1391(c) as written. There is nothing in the legislative history which gives any indication that Congress did not mean what it clearly said in the statute; in fact, the contrary is true. Because the decision of the court of appeals was correct and not in conflict with any decision of this Court, the Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit should be denied.

Dated: February 19, 1991

Respectfully submitted,

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